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No. 91-1707

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

In re: UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner.

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS, PROHIBITION OR OTHER APPROPRIATE REMEDY TO THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents LAUGHLIN E. WATERS and VOULA D. WATERS hereby oppose Petition for Writ of Mandamus, Prohibition or Other Appropriate Relief of petitioner UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"). USAA has failed to demonstrate that the extraordinary relief requested is necessary or that its remedy by appeal is inadequate. As such, the petition should be summarily denied and this matter permitted to proceed by normal means.

1.

INTRODUCTION

USAA has petitioned this Court for issuance of a Writ of Mandamus requiring the trial court to dismiss the complaint in this action. However, USAA's petition is woefully inadequate and fails to demonstrate any need for the extraordinary relief requested.

USAA claims that appeal after judgment in this action is insufficient protection because it would be subjected to conflicting jurisdictional determinations in the 15,000 lawsuits in which it is currently involved. However, USAA's disingenuous argument ignores the fact that the vast bulk of those 15,000 litigations are actions <u>against its insureds and not against USAA directly</u>.

Indeed, USAA's own employee testified at the sanction hearing on this matter, held on May 14 and 15, 1992, that less than 1,000 of the cases are brought against USAA directly. Thus, one of the very basic assertions made by USAA as a premise for extraordinary relief is false and groundless.

Additionally, USAA contends that it will be subjected to conflicting jurisdictional requirements in various circuits as the result of the District Court's ruling in this case which, USAA contends, conflicts with the rulings of the Second Circuit and the Tenth Circuit. Ironically, at the sanction motion, USAA's own expert on jurisdiction was asked if it was not inconsistent for USAA to be seeking to vacate a judgment entered against it in the Tenth Circuit

at the very same time that USAA was seeking to enforce a judgement in its favor in the Ninth Circuit. USAA's expert replied that such conduct was reasonable since there had been no determination in the Ninth Circuit of the jurisdictional issue. Although USAA is apparently not loathe to manipulate federal jurisdiction in its favor, it does not want to be compelled to subject itself to conflicting jurisdictional rulings when it is not in its own best interests.

As discussed in detail below, USAA's jurisdictional arguments are similarly without merit. Given that the District Court properly asserted diversity jurisdiction over USAA, and given that USAA has demonstrated no basis for the extraordinary relief requested, the

petition should be summarily denied and the issues reviewed, if at all, only after final judgment in this matter.

2.

THE DISTRICT COURT PROPERLY ASSERTED DIVERSITY JURISDICTION OVER USAA

USAA's petition follows USAA's well-established and traditional approach and presents a slanted, incomplete and misrepresentative argument in support of its petition for a writ of mandamus. USAA's petition challenges the trial court's use of the decision in Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) by arguing that the rule in Carden v. Arkoma Associates, 494 U.S. 185 (1990) precludes a trial court's determination of whether an entity is a corporation or

an unincorporated association. Interestingly, USAA's petition only mentions in passing that it is accused of affirmatively asserting a basis for federal court diversity jurisdiction in numerous other cases. USAA does not disclose that for nearly twenty years it actually affirmatively invoked federal court diversity jurisdiction in numerous cases by asserting, under oath, that it was a corporation. (See, for example, A-241, A-251, A-255, A-261, A-282.) Only now, after engaging in bad faith conduct in the handling of the fire loss claim of a Federal Court judge, does USAA proclaim its "unincorporated association" status in order to escape the very same federal jurisdiction it has, for so long, invoked when to do so was to its own advantage.

Nor does USAA's petition mention the

fact that it has made judicial admissions of fact that it is a corporation. (See, for example, A-241, A-251, A-255, A-261, A-282.) Under the rule in Ferguson v. Neighborhood Housing Services, 780 F.2d 549, 551 (6th Cir. 1986), those judicial admissions of fact regarding USAA's corporate status, properly confer federal diversity jurisdiction on USAA. USAA will, undoubtedly, opine that subject matter jurisdiction cannot be admitted. However, a careful distinction must be drawn between the admission of jurisdiction and the admission of facts which confer jurisdiction.

> As noted in Ferguson, there is a "distinction between an admission that federal subject matter jurisdiction exists, and an admission of facts serving

> in part to establish federal subject matter jurisdiction. As the Supreme Court stated in an early case: 'Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission.' Railway Co. v. Ramsey, 89 U.S. 322, 327, 22 Wall. 322, 22 L.Ed. 823 (1874) . . . " (Emphasis added.)

Since USAA has judicially admitted that it is a corporation, that admission serves as a proper basis for determining that diversity jurisdiction exists. Not

only was USAA aware that the determination that it is a corporation for diversity purposes was made numerous times before, it knew that it had, itself, made the judicial admissions foundational to that determination and had, in fact, itself made the argument that diversity jurisdiction existed. (See, A-264 - A-277.)

Nor does USAA's petition mention that under Texas corporation law, USAA is defined as a corporation as so stated by the Legislature of Texas in enacting Article 1302-7.06(A)(2) of the Texas Miscellaneous Corporation Laws Act. Defining corporations and setting the rules and regulations thereof, has always been a matter of state law.

USAA argues that Carden v. Arkoma Associates, 494 U.S. 185, 110 S.Ct. 1015

(1990) stands for the proposition that federal courts should not look beyond the issue of whether an entity is, or is not, a corporation under state law for purposes of the diversity determination and may not take a "functional approach" to the determination. Under Carden, as interpreted by USAA, if a business entity has been organized as a corporation under state law, then a corporation it is for diversity purposes. If it is not a corporation, USAA claims that Carden says the rules regarding association citizenship apply. Even assuming that to be the rule of Carden, diversity jurisdiction exists because USAA is, by definition, a corporation.

Since the 1987 amendment to the Texas corporations code, it has been clear that, under Texas law, a reciprocal

interinsurance exchange such as USAA is a corporation. Article 1302-1.03 of the Texas Miscellaneous Corporation Laws Act provides that the Texas Business Corporation Act shall govern all domestic corporations organized under any statute of the State. Tex. Rev. Civ. Stat. Ann. art. 1302-1.03 (Vernon Supp. 1991); see also Tex. Bus. Corp. Act, art. 9.14 (Vernon Supp. 1991)(making Act applicable to any domestic corporation organized under any state statute). As stated in Article 1302-7.06(A)(2) of the Texas Miscellaneous Corporation Laws Act:

> "'Corporation' means: (a) Any corporation, **association**, or other organization incorporated or **organized** under . . . **the Insurance Code** . . . "
>
> (Emphasis added.)

Texas deems reciprocal interinsurance exchanges to be corporations. (Article 1302-7.06(A)(2) of the Texas Miscellaneous Corporation Laws Act.) For diversity purposes, federal courts are required, under Carden, to follow this designation and treat a reciprocal exchange as a corporation -- that is, a citizen of its state of organization and the state in which it locates its principal place of business. USAA, organized under the Texas Insurance Code and having its principal place of business in San Antonio, Texas, is a citizen of the state of Texas; therefore, there is complete diversity between the Waters and USAA and denial of the motion to dismiss was proper.

In some cases, USAA has actually

filed actions in Federal Court, claiming it was a corporation. In other cases, USAA was sued in Federal Court and, in its responsive pleadings, admitted to being a corporation. In yet other cases, USAA removed actions filed in state court to Federal Court, claiming diversity of citizenship on the basis that USAA is a corporation. Only when the Federal Court rulings, judgments or determinations were adverse to it did USAA suddenly claim that it was not a corporation and seek dismissal. When, however, the Federal Court case went well for USAA, it silently accepted the benefits of its jurisdictional manipulations and raised no jurisdictional objection. Now that USAA does not want to be in Federal Court in this case, it again objects to jurisdiction without disclosing to this

Court the fact that it has, itself, on numerous occasions, claimed to be a corporation.

Thus, as the result of its own admissions, as the result of its own affirmative conduct in seeking federal diversity jurisdiction, as a the result of Texas law defining USAA to be a corporation and under Carden, the District Court properly found and determined that USAA was subject to federal diversity jurisdiction in this matter. Accordingly, the foundational, substantive, basis for USAA's petition is without merit and the petition should be denied.

3.

EXTRAORDINARY RELIEF IS UNWARRANTED BECAUSE USAA WILL NOT BE IRREPARABLY HARMED BY WAITING FOR FINAL JUDGMENT

Even more devastating to USAA's arguments than the lack of merit on the jurisdictional issue, USAA's petition presents no sufficient basis for the extraordinary relief requested.

There must be some extraordinary reason for the request for writ relief. (Roche v. Evaporated Milk Association, 319 U.S. 21 (1943).) A writ of mandamus cannot issue upon a simple showing of error. Rather, there must be a showing that the right to issuance of the writ is clear and indisputable, that direct appeal is an inadequate means of obtaining the relief sought and that the

damage or prejudice to that party will not be correctable on appeal. (Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Kerr v. United States District Court, 426 U.S. 394 (1976); Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977).) USAA cannot meet those tests and its petition should therefore be summarily denied.

First, USAA's right to issuance of the writ is not clear and indisputable in this case. As discussed above, there are several proper grounds upon which the District Court's exercise of diversity jurisdiction over USAA can be upheld.

Second, USAA cannot show that direct appeal is inadequate or that it will suffer irreparable harm if a writ is not issued. USAA asserts the following claims of prejudice and irreparable harm:

A. USAA claims in its application that, absent a stay, it will have to manage its 15,000-case docket under conflicting jurisdictional rules. However, USAA's own evidence at the sanctions hearing belies its claim of prejudice here.

At the sanction hearing, USAA's own employee testified that while USAA is involved in approximately 15,000 lawsuits at any given time, the vast majority of those actions are actions against USAA's insureds and do not involve USAA directly. Indeed, USAA's employee testified that in less than 1000 of the cases is USAA an actual party. Even in those actions, many are direct actions against USAA in place of its insured and diversity jurisdiction is not an issue. (28 U.S.C. section 1332(c)(1).) Thus,

there are few cases in which this jurisdictional issue even arises. USAA's attempt to obtain extraordinary relief of the basis of this less-than-forthcoming representation is an illuminating example of USAA's litigation style.

Moreover, even were USAA's representation true that the jurisdictional issue affects 15,000 of its cases, that is simply not a showing of irreparable harm sufficient to justify a writ. Even if USAA is required to respond to complaints or is required to file actions during the pendency of this Court's review, it can remain in, or file in, state court since state court will always have jurisdiction of the matters in a diversity case. If an action is filed in Federal Court, USAA may notice its motion to dismiss based on its

assertion that it is an unincorporated association. Further, the District Court's denial of the motion to dismiss was not published. Since it could be used, at most, as persuasive authority (Starbuck v. City and County of San Francisco, 556 F.2d 450 (1977)), USAA is not placed in any kind of immediate peril by the existence of the District Court's opinion pending the determination of the writ petition.

Finally, writ relief is not necessary because direct appeal is an adequate means of obtaining relief. Interlocutory review is not to be granted in ordinary actions that can be tried on their merits in a few days. (Cardwell v. Chesapeake & Ohio Railway, 504 F.2d 444 (6th Cir. 1974).) As noted, this action can be tried in a few days. All the

issues, including jurisdiction, sanctions and the bad faith judgment itself, can be resolved and one appeal taken from the final judgment. Denying appellate review now will not foreclose USAA's right to challenge jurisdiction after final judgment. Nothing will be lost and, should USAA come to its senses in the meantime and settle this action, much will be gained by preventing the waste of judicial resources by precluding USAA's ability to further delay this action now.

As noted by the District Court in denying certification for interlocutory appeal, it would be most efficient to "package" all the issues for a single appeal, including the jurisdictional issue, the sanctions issue and the determination of the action on its merits. To that end, the District Court

advanced the trial date of this action to June, 1992. Only at USAA's request was that trial continued to October, 1992. Since all the issues can be determined after final judgment, and nothing will be lost to USAA, interim review is simply not warranted or justified.

4.

CONCLUSION

USAA has failed to provide any justifiable basis for invoking the extraordinary remedy of interim review in this case. USAA has presented no factual or legal arguments which justifies this Court impeding the normal progress of this action. Indeed, USAA's petition is nothing more than further evidence of its hardball tactics which will burden this

Court and the litigants without dealing with the merits of a case. Having failed to supply any adequate justification for the requested relief, USAA's petition for writ of mandamus or other relief should be denied.

Dated this 22 day of May, 1992 at Claremont, California.

SHERNOFF, BIDART & DARRAS

By: _____
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